SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
[illegible]
CLERK

No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1970

EVELIO DEL TORO, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 404

EVELIO DEL TORO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Middle District of Florida of selling heroin not pursuant to an order form in violation of 26 U.S.C. 4705(a) and was sentenced to imprisonment for five years.[1] The court of appeals affirmed in an opinion (Pet. App. 1–8) which is not yet reported.

The sole contention raised here is that the district court erred in refusing to charge the jury, as requested by petitioner, that conviction for the offense carried a mandatory jail term. As the court below properly

[1] Petitioner was given a concurrent sentence under a count charging a violation of 26 U.S.C. 4724c. The court of appeals did not reach the validity of the conviction on that count and petitioner does not here challenge that aspect of the decision below.

401-418—70

held, to inform the jury of matters relating to the possible terms of punishment is to draw the attention of the jury away from their duty to determine facts.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

---

[2] The considerations which have led legislators to allow a jury to rule on the question of life or death are different from those involved in informing the jury about permissible terms of imprisonment. In any event, even in death cases, the question of punishment would not be submitted to a jury in the federal courts in the absence of a properly implemented legislative judgment that the matter should be determined by a jury. See *United States* v. *Jackson*, 390 U.S. 570.

U.S. GOVERNMENT PRINTING OFFICE: 1970